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In The

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, PROSECUTING ATTORNEY OF ST. JOSEPH COUNTY, INDIANA; LINLEY E. PEARSON, ATTORNEY GENERAL OF INDIANA; CIVIL CITY OF SOUTH BEND; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

vs.

GLEN THEATRE, INC., *et al.* and DARLENE MILLER, *et al.,*

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF AMERICAN FAMILY ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Consent of the Parties

American Family Association, Inc. (AFA), has received consent of the parties to the filing of this Brief Amicus Curiae. Consent of the Petitioner, Michael Barnes, et. al, was received from Wayne E. Uhl, Esq., Deputy Attorney General and of Respondents, Glen Theatre, Inc., et al, from their attorney, Lee J. Klein, Esq.

American Family Association's Interest

AFA is a nonprofit organization incorporated in 1977 under its original name of National Federation for Decency, Inc. AFA operates as a

leader of citizen and church participation to promote traditional American family values and apply the Biblical ethic in society. As Amicus, AFA has supporters in all 50 states; has approximately 600 chapters of local citizens who are active in seeking to preserve community integrity through the implementation of public decency laws and has over 400,000 individuals and churches who are subscribers to its monthly newsletter, AFA Journal.

AFA is consistently asked by local governments and law enforcement officers for advice and guidance on methods of regulating nude dancing establishments. AFA chapters actively seek to preserve the integrity of their local communities. The

effective use of public decency statutes to preserve traditional values is a method which is used by local chapters.

The ability of AFA to continue to call for the enforcement of such laws is contingent upon a finding that a state may impose sanctions upon individuals appearing nude in public. Amicus, and the citizens it represents, would be severely harmed if the decision of the United States Court of Appeals for the Seventh Circuit was permitted to stand. Consequently, AFA will support the position of the State of Indiana regarding the constitutional application of public decency laws to nude dancing.

SUMMARY OF ARGUMENT

This Court has traditionally afforded nude dancing few First Amendment protections. The Seventh Circuit has disregarded these precedents and has extended prior Supreme Court case law beyond the bounds of the logical implications of those decisions.

The Seventh Circuit's decision would elevate nude dancing to a place that few activities within the State of Indiana enjoy. It would, in many circumstances, place nude dancing beyond the legitimate control of the State.

LAW AND ARGUMENT

I. THE SUPREME COURT HAS TRADITIONALLY AFFORDED NUDE DANCING MINIMAL CONSTITUTIONAL PROTECTION

A. Supreme Court Decisions Clearly Demonstrate that Nude Dancing is Afforded the Barest of First Amendment Protections

The Seventh Circuit in Glen Theatre, Inc. v City of South Bend, Nos. 88-3006, 88-3244 (7th Cir., May 24, 1990), relies on three decisions from the Supreme Court to justify the extension of First Amendment protection to nude dancing. First, the court looked to California v LaRue, 409 U.S. 109 (1972), in which the Supreme Court found that the regulation of nude dancing in establishments which served alcohol was within the powers of the state granted by the twenty-first amendment. In LaRue, the Court recognized that

"some of the performances to which these regulations address themselves are within the limits of constitutional protection." 409 U.S. at 118. The Supreme Court did not specify the particular qualities which afford a performance the protection of the First Amendment. However, from a reading of its decision, one is led to conclude that the Supreme Court found that such characteristics do exist and are capable of determination.

The second case the Seventh Circuit relies on is Doran v Salem Inn, 422 U.S. 922, 932 (1974). In Doran, the Supreme Court stated that "[a]lthough the customary 'barroom' type of nude dancing may involve the barest minimum of protected speech, we recognized [in LaRue] that this form

of entertainment might be entitled to first and fourteenth amendment protection." As the Supreme Court noted, the amount of protection afforded such activity is minimal, at best.

The Seventh Circuit's final authority was Schad v Mt. Ephraim, 452 U.S. 61, 66 (1981), in which the Supreme Court stated, "Nude dancing is not without its First Amendment protections from official regulations.' Id. (citations omitted)." However, once again this Court failed to determine to what extent the First Amendment protects nude dancing in light of legitimate state interests. The only issue clearly resolved in Schad, was that the state interest proffered was not

sufficient for a complete ban on all live entertainment, including family entertainment establishments. That the state interest was not sufficient to regulate sexually oriented businesses, nude dancing establishments specifically, was not the Court's conclusion and such a conclusion cannot be inferred from the opinion.

Thus, the cases from this Court that the Seventh Circuit relies upon are not squarely on point. They clearly do not establish that this Court has declared that nude dancing is afforded complete First Amendment protection. Whether, and to what extent, nude dancing is constitutionally protected is a matter yet to be determined by this Court.

B. There is a Conflict Among Courts as to the First Amendment Protection Afforded Nude Dancing

The Seventh Circuit has held that Indiana's public indecency statute is unconstitutional as applied to non-obscene nude dancing. Nude dancing, the Court states, is "inherently expressive," and thus deserves first amendment protection. Slip op. at 8.

This decision conflicts with the rulings of two other circuit courts and at least one district court. In Wal-Juice Bar v City of Oak Grove, 899 F.2d 1502 (6th Cir. 1990), the Sixth Circuit refused to recognize that the most recent Supreme Court cases extended First Amendment protection to nude dancing. The decisions in Iacobucci v City of Newport, 479 U.S. 92, 96 (1986) and New York State

Liquor Authority v Bellanca, 452 U.S. 714, 718 (1981) "rather plainly indicate[] that nude dancing is not a fundamental right entitled to heightened scrutiny under the due process clause." Earlier, in the unpublished decision of Taylor Novelty, Inc. v City of Taylor, Nos. 85-1439, 85-1506, slip op. at 5 n.1 (6th Cir. 1987) the same court refused to interpret Schad as extending First Amendment protection to coin operated machines for viewing nude dancing.

In Grand Faloon Tavern, Inc. v Wicker, 670 F.2d 943 (11th Cir. 1982), the Eleventh Circuit was also careful not to bring nude dancing within the full scope of First Amendment protection. The Court concluded that nude dancing "involves a substantial

degree of conduct." 670 F.2d at 948. Therefore, the Court did not enter into First Amendment analysis, but applied the O'Brien test.

Finally, at least one federal district court has upheld a public indecency statute similar to that of Indiana. The Court for the Northern District of Texas in Kew v Senter, 416 F.Supp. 1101, 1104 (N.D. Tex. 1976) refused to rule that a public nudity statute was overbroad, finding that "the behavior condemned falls so far down the scale toward conduct. . . and so far from 'pure speech'" that the regulation of nude dancing did not even trigger overbreadth analysis. Furthermore, the court stated that it was "difficult to conceive of ideas entitled to first amendment protection

which can be solely- or even best-expressed by baring the anus or genitals in the circumstances forbidden by the statutes." 416 F.Supp. at 1105.

II. THE SEVENTH CIRCUIT'S PROTECTION OF NUDE DANCING CONTRADICTS PRECEDENT AND BRINGS NUDE DANCING WITHIN THE FULL AMBIT OF THE FIRST AMENDMENT

Contrary to precedent, the Seventh Circuit in Glen Theatre, extends a new level of protection to nude dancing and takes any previously recognized protection from the range of "minimal" to that of significant. The rationale of the Seventh Circuit supports the position that nude dancing receives not just limited protection, but comes fully within the scope of the First Amendment. The question the Seventh Circuit sought to

resolve was "whether '[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who view it.' Texas v Johnson, 109 S.Ct. 2533, 2539 (1989) (quoting Spence v Washington, 418 U.S. 405, 410-411)." Slip op. at 11. To answer this question, the Court of Appeals looked to the history of dance.

After a review of the history of dance as an art form, the Seventh Circuit found that dance was "inherently expressive". Slip op. at 8. When nudity is combined with dance, the message was clear to the court: the dancers are communicating with an "emotional" message of "eroticism and sensuality". Slip op.

at 11. It is this message which the court found to be the determining characteristic--the quality separating protected expression from unprotected conduct.

The Seventh Circuit, however, asserts that such a definition does not make nude dancing immune to state regulation.

> A sovereign may establish reasonable time, place and manner restrictions on protected expression. Renton v Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986). Such legislative power unquestionably permits the state to bar the imposition of nude dancing upon the public in settings such as streets, parks, and beaches. Similarly, it may regulate expressive conduct for reasons unrelated to the suppression of speech. United States v O'Brien, 391 U.S. 367 (1968). It may also regulate nude dancing under the power granted by the Twenty-first Amendment. California v LaRue, 409 U.S.

109 (1972); City of Newport v Iacobucci, 107 S.Ct. 383 (1986). And it most certainly may ban obscene nude dancing. Sable Communications, 109 S.Ct. at 2835.

Slip op. at 15.

In reality, the Seventh Circuit is not recognizing the ability of a state to regulate nude dancing. The Seventh Circuit's decision effectively prohibits the state from exercising its right to regulate public nudity. As the State of Indiana observes in its Petition for Certiorari, "the Seventh Circuit's reasoning . . . is not limited to nude dancing inside bars and 'bookstores' before consenting adults." Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, at 12 (June 29, 1990). In light of the Seventh

Circuit's decision, there is nothing left to protect the unsuspecting beach-goer from an "organized flasher, shucking his coat in a booth next to the hot dog vendor and adding a boom box and hip motions." Slip op. at 91 (Easterbrook, J. dissenting). What the Seventh Circuit has failed to recognize is that what has served to protect the public from open nudity has not been the public's right to be shielded from what it might find offensive. On the contrary, it has been that the various courts have not been able to find any significant expressive conduct in public nudity so as to protect it from state regulation. South Florida Free Beaches v City of Miami, 548 F.Supp. 53 (S.D. Fla. 1982). Yet, when the

Seventh Circuit assigns expressive meaning to nude dancing, it becomes constitutionally protected whereas before it was subject to reasonable regulation.

Taken in conjunction with other recent public expression cases, the decision of the Seventh Circuit nullifies the right of the general public to be shielded from rhythmic nudity. Over the past two decades, the Supreme Court has severely limited the rights of the general public to be shielded from expression they might find offensive. This Court held, in Texas v Johnson, 109 S.Ct. 2533, 2544 (1989), that "if there is a bedrock principle underlying the first amendment, it is that the Government may not prohibit the expression of an

idea simply because society finds the idea itself offensive or disagreeable."

The message of "eroticism and sensuality" purveyed by the dancers, is protected unless the state can prove that the viewers have a "substantial privacy interest . . . being invaded in an essentially intolerable manner." Cohen v California, 403 U.S. 15, 21 (1971). Only when this is demonstrated can the state "shut off discourse solely to protect others from hearing it." Id.

These criteria could not possibly be satisfied in the case of nude dancing on a public street, park or beach. A substantial privacy interest has only been recognized in situations in which there is a captive audience

unable to avoid contact with such expression. See, Federal Communications Commission v Pacifica Foundation, 438 U.S. 726 (1978). By the same measure, such a substantial privacy interest has been denied to the passerby on a public street. Erznoznik v Jacksonville, 422 U.S. 405 (1971).

It is doubtful that this Court intended that the protection it has afforded offensive political speech; see, Texas v Johnson and Cohen v California, be extended to nude dancing. This is particularly true in light of the manner in which this Court has treated nude dancing in the past. Taken to its logical conclusion, however, the Seventh Circuit's decision affords protection

to "non-obscene nude dancing for entertainment purposes" the same level of protection as political speech.

III. CONCLUSION

For the foregoing reasons, specifically recognizing that the Seventh Circuit's decision conflicts with Supreme Court precedent and decisions from other courts and that this decision effectively removes nude dancing from the realm of local regulation, this Court should grant this Petition for Certiorari.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief Amicus Curiae of American Family Association, Inc., have been mailed this thirty-first day of July, 1990, to the following counsel of record:

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